ALI IBRAHIM & ORS.

v.

T.M.L. MOHD. HUSSAIN

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 22-272-80]
30 APRIL 1987

TRUSTS: *Death-bed - Entire assets to wives and children - Express or constructive - Statute of Frauds - Fiduciary position - Three certainties - Breach of trust - Trustee must not place himself in a position where his duty and interest may conflict - Trustee cannot purchase trust property - Bona fide purchaser for value without notice - Question of constructive notice.*

The deceased, Mohamed Ibrahim bin Fakir Mohamed @ Pakir Mohd. Ibrahim, on his death bed appointed T.M. Sidda Shaik Madar @ Long bin Thina Aydin (Long, for short) to be his trustee to look after his wives and children and for this purpose entrusted his entire assets, including the disputed property to be held on trust for their use and benefit. Following the death of the deceased, Long assumed the position of guardian to the children and provided maintenance for the wives and children.

At the time of the deceased's death, the disputed property was subject to a mortgage and on 28 January 1932, the mortgagee enforced his security with the result that the disputed property was sold at a public auction to Long, he being the highest bidder.

Later, on 15 June 1951, Long transferred the disputed property to his son, the defendant according to the conveyance for a consideration of RM10,000.

The plaintiffs, who were the children of the deceased, contended that the disputed property was subject to an express trust, Long being the trustee and alternatively, the disputed property was subject to a constructive trust, Long and the defendant not being *bona fide* purchasers for value without notice.

Held:

[1] The disputed property was subject to the trust declared by the plaintiffs' deceased father because the three essentials for the creation of the trust, that is, certainty of words, subject matter and objects were fully established, and in West Malaysia, the Statute of Frauds requiring declaration of trust to be evidenced in writing does not apply.

[2] The defendant acquired the disputed property with constructive notice of the trust, and, the defendant was not a *bona fide* purchaser for value of the disputed property. Therefore a declaration was made that the defendant holds the disputed property as a bare trustee for the widows and children of the deceased Mohamed Ibrahim.

[3] The defendant to transfer the disputed property within 7 days from the date hereto to the First and Fifth plaintiffs as trustees for the said beneficiaries, failing which the Senior Assistant Registrar of the Court may do so.

[4] Costs of this action to be paid by the defendant.

[Judgment for plaintiffs.]

Cases referred to:
Holder v. Holder [1968] All ER 116
Cookson v. Lee [1853] 23 LJ Ch 473
Hodgson v. Mark & Anor. [1971] 2 All ER 684
Nelson v. Larholt [1947] All ER 251
Loke Yew v. Port Swettenham Rubber Co. Ltd. [1913] AC 491
Plunkett v. Bull 19 CLR 544
Hill v. Wilson 8 Ch App 888
Re Garnett 31 Ch D 1
Lachmi Parshad v. Maharajah Narendro Kishore Singh Bahadur LR 19 IA 9
Lee Phek Choo v. Ang Guan Yau & Anor. [1975] 2 MLJ 146
Wan Naimah v. Wan Mohmad [1974] 1 MLJ 41
Diamond Peak Sdn. Bhd. v. Tweedie [1982] 1 MLJ 97
Knight v. Knight [1840] 3 Beav 148
Hussey v. Palmer [1972] 3 All ER 774
Protheroes v. P. [1968] 1 All ER 411
Boston Deep Sea v. Ansel [1888] 39 Ch D 339
Boardman v. Phipps [1966] All ER 721
Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd. [1923] NZLR 1137
Hosking Properties v. Barnes [1971] SASR 100
Munro v. Stuart [1924] 41 SR (NSW) 203
Oertel v. Hordern [1902] 2 SR (NSW) (Eq) 37
Ong Chat Pang v. Valliappa Chettiar [1971] 1 MLJ 224
Sungei Biak Tin Mines v. Saw Choo Theng [1970] 1 MLJ 199

Legislation referred to:
Civil Law Act 1956, s. 3(1)
Conveyancing and Law of Property Ordinance (Cap 118), s. 25

Other sources referred to:
Halsbury's Laws of England, 3rd Edn., Vol. 38, p. 830, para. 1388
Fiduciary Obligations, Prof. Finn, 1977, p. 9
Bowstead on Agency, 13th Edn., p. 1

For the plaintiffs - Mohideen Abdul Kader; M/s. Syarikat Mohideen Abdul Kader
For the defendant - Cecil Rajendra; M/s. Subbiah & Co.

JUDGMENT

Edgar Joseph Jr J:

This case is about relatives who although at one time were on the best of terms have fallen out badly. Their quarrel has now reached the Courts in the shape of a dispute about the ownership of a dwelling house known as 27, Rangoon Road, Penang ("the disputed property"). As often happens in such cases, each side is accusing the other of fraud and dishonesty. My task will be to determine where the truth lies, based strictly on the evidence and the law applicable thereto and nothing else for this is a Court of law and not a Court of morals. These remarks are elementary but are worth mentioning for to lose sight of the obvious in this case may give rise to confusion and possible injustice.

I shall, first of all, introduce the parties to this suit.

The five plaintiffs are the children of one Mohamed Ibrahim bin Fakir Mohamed @ Pakir Mohd. Ibrahim who died on 12 November 1931 ("the deceased") and left surviving him two wives and ten minor children.

At the time of his death, the deceased was not well off but comfortably off for he had been trading as sole proprietor of a stevedoring firm and owned and operated two tongkangs. He also owned a motor car and the disputed property in which his children and wives lived.

It is worth mentioning that the disputed property was purchased by the deceased on 13 January 1928 for a consideration of RM6,500 and on 23 January 1929 mortgaged it as security for the repayment of a loan of RM5,475 from one Sithambaram Chettiar.

The defendant is the son of one T.M. Sidda Shaik Madar @ Long bin Thina Aydin ("Long" for short) whose sister was the first of the deceased's wives. This, of course, means that the plaintiffs and the defendant are first cousins being the children of a sister and a brother respectively. In addition, they are also related by marriage, for the defendant married one of the daughters of the deceased who is not a party to these proceedings.

According to the evidence led on behalf of the plaintiffs, the deceased, when on his death bed, appointed Long to be his trustee to look after his wives and children and, for this purpose, entrusted his entire assets, including the disputed property and his stevedoring firm, as a going concern, to be held in trust for their use and benefit. To carry out these objects, the profits accruing from the stevedoring business were to be applied for their maintenance.

Apart from all this, the deceased expressed the wish, on his death bed, that Long should arrange a marriage between the defendant and one of the deceased's daughters. All these things Long agreed to do, in the presence of a witness named Abbas bin Mohd. Rouse (PW2) who has survived to tell the tale but whose evidence I shall examine more fully later.

It is admitted by the defendant that following the death of the deceased, Long assumed the position of a guardian at first to the children of the deceased, and also operated the stevedoring business aforesaid through an agent C'Rowther and after 1939 did so personally, applying the income derived from it for their maintenance. However, the defendant resiled from this last mentioned fact when he denied that his father had met the expenses of members of the family of the deceased from the deceased's business.

Be that as it may, I must now refer to certain events which gave rise to the dispute, the subject of this action.

I have already referred to the mortgage executed by the deceased over the disputed property. At the time of his death, the mortgage still remained in force and, according to the events which happened on 28 January 1932, the mortgagee Sithambaram Chetty enforced his security, with the result, that the disputed property was sold at a public auction to Long, he being the highest bidder, at a price of RM4,300. This was just over two months after the death of the deceased. To effect the purchase Long had on 12 February 1932 mortgaged the disputed property to the same Chetty to raise a loan of RM4,000.

This sale of the disputed property to Long has been impugned by the plaintiffs on the ground that a trustee cannot purchase trust properties without the consent of the beneficiaries or without an order of Court and, that as in this case neither of these requirements was fulfilled, the purchase is voidable at the instance of the beneficiaries (see *Holder v. Holder* [1968] All ER 116, 126).

It was accordingly submitted that essentially, by means of what was in effect a mere paper transaction, Long became the owner of the disputed property, but that he studiously concealed this fact from the widows and children of the deceased; so much so, that it came to light only in 1976 after the death of the widows, when the defendant commenced proceeding for

ejectment in the Magistrates' Court, George Town, to recover vacant possession of the disputed property from plaintiffs who had been in occupation of it all these years without paying any rent. In the result, Long has selfishly deprived them of their most valuable asset. To emphasise the point Counsel pointed out, that surely, had Long been concerned about the welfare of the widow and children, could he not have renewed the loan to prevent the disputed property being auctioned. There appeared no reason why this could not have been done since funds were presumably available from the stevedoring business left behind by the deceased - so Counsel's argument ran.

The legal formalities necessary to enforce the mortgage were also questioned by Counsel. For example, Counsel raised the query as to whether the statutory notices under s. 25 of the Conveyancing and Law of Property Ordinance (Cap 118) had been served on the successor in title of the mortgagor (the deceased) - ordinarily, this would be the duly constituted personal representatives of the deceased. There was no evidence of this.

If, on the other hand, such notices had been served on Long, he being the guardian of the deceased's minor children, why had he not taken the necessary steps to save the disputed property from being auctioned, especially so, since funds were presumably available from the deceased's stevedoring business. Instead, by a cunning device, Long had appropriated the disputed property for his own personal benefit. There was thus clearly a conflict of duty and interest situation - so Counsel submitted.

Later, to be exact, on 15 June 1951, Long transferred the disputed property to his own son the defendant. According to the conveyance, this was for a consideration of RM10,000 (pp. 13 and 14 of the Agreed Bundle) but Counsel for the plaintiffs impugned this transaction on the ground that it was a mere device to make recovery of the disputed property by the plaintiffs more difficult. It was pointed out that it was improbable, to say the least, that the defendant had the resources, at the time, to raise as much money as that, having regard to his station in life. He was then employed by his father as a Clerk at a salary of only RM250 p.m. and, although the defendant claimed to have a stevedoring business of his own, there was nothing apart from the defendant's bare assertion that he had the necessary resources to make the alleged purchase. Then it was said the payment of the purchase price was allegedly made in cash by the defendant to the solicitor concerned who, curiously enough, was said to have issued no receipt.

In these circumstances, it was argued that the disputed property was subject to an express trust for the benefit of the widows and children of the deceased, Long being the trustee.

Alternatively, the disputed property was subject to a constructive trust in their favour because Long was clothed with the mantle of a fiduciary and was under a duty to manage the deceased's property in the interests of the heirs concerned; his failure to do so was not only a breach of trust but was fraudulent and dishonest.

It was further argued that as Long stood in a fiduciary relationship to the widows and the minor children of the deceased, the onus was on the defendant to prove the *bona fides* of the purchase by Long and subsequently by himself, and this he had failed to do.

On the contrary, it was submitted that the defendant must have known that Long, his father, was the trustee express or constructive of the disputed property and so had actual notice of the trust. Alternatively, the defendant had constructive notice of the trust. In support of this latter submission my attention was drawn to the following facts:

(a) the defendant had admitted that the deceased's family had been residing in the disputed property continuously since 1928 and paying no rent;

(b) yet the defendant had studiously refrained from informing the widows and their children of the purchase by him of the disputed property in 1951 nor did he make any enquiries of them.

The law, it was said, was that a person who abstains from making proper enquiries as to facts which, had he done so, would have led to discovering their existence, will be held to have constructive notice of the same. Constructive notice was as good as actual notice and this was supported by cases such as *Cookson v. Lee* [1853] 23 LJ Ch 473 and *Hodgson v. Mark & Anor*. [1971] 2 All ER 684. The point was then made that since the defendant had acquired the disputed property with notice actual or constructive of the trust he must be deemed to be a trustee of it for the beneficiaries: *Nelson v. Larholt* [1947] All ER 251 and *Loke Yew v. Port Swettenham Rubber Co. Ltd.* [1913] AC 491. In any event, it was argued that the defendant did not have the necessary resources to raise the sum of RM10,000 to purchase the disputed property as had been alleged by him.

In these circumstances, it was submitted that the defendant had not discharged the onus which lay upon him of establishing that he was a *bona fide* purchaser for value without notice of the rights of the plaintiffs. Accordingly, the conveyance of the disputed property to Long was voidable at the instance of the plaintiffs they being the beneficiaries of the deceased.

I shall now examine the testimony of the witness Abbas bin Mohd. Rouse (PW2) who was the essential prop in the plaintiff's case.

By way of introduction, he mentioned that he was 79 years of age which would mean that he was aged 24 in 1931, the year in which it was alleged, the deceased created the express trust. He then said that upon leaving school he worked as a teleclerk supplier in his father's business. He said he knew the deceased, the defendant and his father Long and was in fact on good terms with them.

He was then examined with regard to specific matters of direct relevance to the issues which arose for decision.

He recalled that at the time of his death, the deceased owned a motor car, a dwelling house in Lorong Manggis, later renamed Rangoon Road ("the disputed property") in which he lived with his family and two tongkangs.

He was then asked the following important question.

Q: Do you know if the deceased Ibrahim made any arrangements as to his property and family in the event of his death?

A: Yes. About 4 to 5 days before his death, I called on the deceased at his dwelling house. Long was also present.

Deceased entrusted Long with the task of looking after his family and his property in the event of his death.

Then came the question of critical substance; it was this:

"What did deceased say to Long?" and which drew the answer: "I entrust you with my business and ask you to continue it. Whatever profits are raised to be given to my children. Also, look after my children."

"The dwelling house is for the children to live in. The tongkangs are to be used for carrying on the business." Asked as to what Long's response was to this death bed request, the witness replied, "Long agreed to do so."

The witness was then taken to events which followed the death of the deceased; this is what he said: "After deceased died Long looked after the deceased's business and children."

He added that "... the family was maintained from the income derived from the deceased's tongkang business which was operated by Long."

Touching on the income of the deceased, the witness claimed that he knew about this and estimated this to be approximately RM3,000 p.m. - sometimes more but sometimes less, say, RM2,000 p.m. When asked how he knew about this, he said the deceased told him so.

He ended his examination-in-chief by saying that during the life time of Long he had never heard that Long had bought the deceased Ibrahim's dwelling house in Lorong Manggis ("the disputed property"). Nor had he heard of any transfer of the same to the defendant.

Cross-examination of the witness Abbas opened with questions concerning the tongkang business operated by Long and his resources. The witness confirmed that Long's business was substantial and similar to that of the deceased.

When asked as to the frequency of his visits to the deceased, the witness said that he used to call on the deceased at the latter's home once or twice a month.

Counsel for the defendant then asked: "Was it not 2 or 3 days rather than 5 days before his death that you visited the deceased Ibrahim at his house when he gave Long directions about his property and family?" To which question the witness replied: "It was within one week before his death. Yes, that was the last time I saw the deceased alive." He explained that he happened to be there that day.

Cross-examination then turned to the crucial events which had given rise to the disputes the subject of this action. He confirmed that at the time the deceased gave directions to Long "about his family property and his business" there were only three persons present at the same time: they were the deceased, Long and himself. He affirmed that the deceased did not appear seriously ill, knew what he was talking about, and was sitting up in an inclined position. The first few words the deceased spoke to Long were in Tamil but then he changed to Malay. The directions the deceased gave to Long were in Malay.

When it was suggested that the deceased in giving his directions did not mention which dwelling house the witness replied that the deceased had said "that house in which I and my children are staying is for my children."

In response to further questions, the witness confirmed that the deceased did not tell Long that the disputed property had been mortgaged.

There was no re-examination and, on that note, the plaintiffs closed their case.

It is now necessary to consider the testimony of the defendant.

By way of introduction, the defendant affirmed that he was 66 years old and was the registered proprietor of the disputed property.

He said that although he purchased the disputed property from his father Long in June 1951 at a price of RM10,000, he had not, until now, received any rents from the occupiers thereof.

Asked as to where he got the money to purchase the disputed property, he replied that he was working for his father Long as a supervisor in his litherage business in Penang since 1939 until his death in November 1954. After the period of the British Military Administration, his father paid him RM250 p.m. for his services. He added that he was also engaged in his own litherage business when the British reoccupied Malaya.

He could not, of course, say how his father acquired the disputed property.

Similarly, he could not say if, when his father owned the disputed property, assessment notices were sent to him.

However, after he purchased the disputed property, assessment notices were addressed to the disputed property and the 2nd and 3rd plaintiffs would bring them to him. He was then referred to and identified two assessment notices, Ex. P4A & B in respect of the disputed property for the years 1971 and 1976.

He claimed that the plaintiffs should have known that since 1951 he was the owner of the disputed property. However, he admitted that he did not at any time tell the plaintiffs that the disputed property belonged to him. He added that there was no point his telling them this.

Asked if his father had, at any time, told him that he was holding the disputed property in trust for the plaintiffs, he replied "No".

He then confirmed the obvious; namely, that he did not know the deceased well because at the time of the latter's death in 1931 he was only 11 years old.

The defendant was then examined as to what happened to the deceased's business following his death.

The defendant said that after the death of deceased, the latter's tongkang business was carried on by one Shakkaraiowther, an agent appointed by his father Long, and his uncle one T.M. Shaik Mohamed. All three had, of course, long since died.

He confirmed that the deceased and his father Long were very close. He was unable to say in what language the deceased and Long conversed. Although the deceased came from India he did not know if he was more conversant in Tamil rather than Malay.

He further confirmed that the plaintiffs were staying all along in the disputed property rent free and that he had allowed them to do so because they were his in-laws and he was not in need of it.

He then ventured a suggestion as to why the present action had been brought against him. He believed that it was because he had, in 1977, commenced an action for ejectment against the plaintiffs (see Ex. P2) that they had instituted the present suit against him.

On that note, Counsel for the defendant concluded his examination-in-chief of the defendant.

It was then the turn of Counsel for the plaintiffs to cross-examine.

The defendant confirmed that since 1928 when the deceased bought the disputed property he and his family had lived there and that even up to now some members of the family resided there.

Asked whether or not it was true that none of the members of the deceased's family were ever told that Long had purchased the disputed property, the defendant replied that he did not know about that.

But, he did confirm, that when he bought the disputed property in 1951 he did not inform the plaintiffs that he had purchased it. In fact, he had never informed them about this.

It was his father Long who had instructed the solicitor, one Mr. Khoo Hock Soon to prepare the conveyance transferring the disputed property to him.

He claimed that he had paid his father the purchase price of RM10,000 (which he said was the market price) in cash and this money he had handed over to the solicitor who, however, did not give him a receipt.

In answer to questions by the Court, he said that although he was operating his own litherage business since 1947 he did not then have a bank account. He said he first began operating a bank account in the mid-1960's. In these circumstance, he had kept the RM10,000 in cash in his bedroom in a cupboard.

He added that he did not keep it on fixed deposit in a bank or in the post office because he was not keen on getting interest.

Cross-examination then turned on the defendant's family and his father Long's resources.

He confirmed that in 1951 his father had three children - of whom he was the only child of a first marriage and then still unmarried. There were also two children from a second marriage - a boy and a girl who were also then unmarried. Both his father Long's wives were then still alive.

He went on to testify that in June 1951 his father was not well off but comfortably off. He did not know what his father's income was; but his father had four lighters and a thriving stevedoring business.

Asked as to his father's assets in June 1951, he said that his father owned the disputed property, a house, a piece of land in Sungei Nibong and another piece of land in Sungei Ara.

He confirmed that he was his father's favourite child. He added that he was the only child helping his father in the business. His father had delegated most of the management of his business to him; in fact, he was in effective control of it. In answer to the Court, he said that his father had assigned his stevedoring business to him for love and affection early in 1954 - the same year his father had died.

Questioned as to his own resources, the witness said that in 1939 when he first assisted his father, he was paid RM25 p.m. but that gradually this sum was increased to RM250 p.m. by 1951.

He added that because he lived with his father until just before his death, his personal expenses were very small.

It was then put to him that in fact he had paid nothing for the house because it was given to him for love and affection but he denied this.

He said he now kept his money on fixed deposit with a bank and that he received interest. He began paying income tax in 1948 or 1949. He started operating a current bank account for his business in 1954.

He added that between 1947 to 1954 he was only doing litherage business jointly with his father but, upon his father's death, he engaged in a stevedoring business of his own.

Cross-examination then turned on the business left by the deceased.

The defendant said that at first his father Long had nothing to do with the business of the deceased.

It was one Shakkarairowther (who had been appointed by Long) who managed the deceased's business, collected the income derived from it and passed it over to Long who in turn, would pass it over to the mother of the plaintiffs to meet their living expenses. This procedure was followed from the time of the death of the deceased until 1939. Thereafter, his father Long took charge of the deceased's business and carried on the duties of Shakkarairowther.

When it was put to him that, in fact, ever since the death of the deceased, his father Long had managed the business, he replied that was not true.

And, when it was further put to him, that it was from the income derived from the business that his father Long had met the expenses of the members of the family of the deceased, the witness replied "No".

He said that from 2 to 3 years prior to his father Long's death, he was in charge of running his father's business. However, financial control of the business remained with his father. Consequently, he did not pay the assessment rates in respect of the disputed property.

When it was put to the defendant that none of the plaintiffs had handed to him any assessment bills in respect of the disputed property he replied that the Second and Third plaintiffs had done so. He added, that between 1951 and late 1976, assessment bills were addressed to the disputed property and that the Second and Third plaintiffs would bring them to him. He said that this was not inconvenient as they visited each other regularly.

He confirmed that two of his children - a son born in 1946 and a daughter born in 1932 - were left in the care of the deceased's wife who resided in the disputed property.

He did not know who paid the assessment rates between 1931 and 1951 but from July 1951 he said that he had been paying the same. The cross-examination also touched on the defendant's fixed assets. The Defendant said that he had a dwelling house in Tg. Bungah which he had sold the previous year and two houses in Pahang Road which he had sold in 1969 or 1970. He added, however, that he still had two dwelling houses; the disputed property and his residence.

Under re-examination, the defendant sought to explain why he kept cash at home. He said that in the stevedoring and litherage business one had to keep ready cash for instant use; this was because workers might call at odd hours of the night to ask for payment of wages or advances.

On a concluding note, the defendant said that he had paid for all wedding expenses of the plaintiffs and for the funeral expenses of one of their sisters. All these payments he said were in cash.

The defence then closed its case.

In a nutshell, it was submitted for the defence, that both the deceased and his son the defendant were *bona fide* purchasers for value without notice actual or constructive of the alleged interests of the plaintiffs. At no time, therefore, did they declare that they were trustees for the plaintiffs nor did they hold themselves out as such.

It is necessary to consider the submissions of Counsel for the defendant. However, before I proceed to do so, I shall keep in the forefront of my mind the fact though the claim in this case was necessarily made against the defendant, since the disputed property stands registered in his name, it was in substance a claim made against the estate of Long who had long since died. That this must be so, is clear since if the plaintiffs fail to successfully impugn Long's title to the disputed property, their claim against the defendant would not even get off the ground and must also necessarily fail.

I have accordingly kept in the forefront of my mind the salutary advice of Isaac J in *Plunkett v. Bull* 19 CLR 544, 548 that:

> ... in cases of this sort the Court scrutinizes very carefully a claim against the estate that the Court looks at the plaintiff's case with suspicion and as *prima facie* fraudulent, but scrutinizes the evidence very carefully to see whether it is true or untrue.

To the same effect are the cases of *Hill v. Wilson* 8 Ch App 888, *In Re Garnett* 31 Ch D 1, and *Lachmi Parshad v. Maharajah Narendro Kishere Singh Bahadur* LR 19 1 A 9.

I must now consider the submissions of Counsel for the defendant.

In the first place, it was submitted that the Statute of Frauds applied to the present case by virtue of s. 3(1) of the Civil Law Act 1956, so that even if the Court found that the deceased had orally appointed Long a trustee of the disputed property it was not subject to any trust there being no writing evidencing the trust and that consequently the plaintiff's claim was unsustainable. The following passage from *Halsbury's Laws of England*, 3rd Edn. Vol. 38 p. 830 para. 1388 quoted with approval in the Sarawak case of *Lee Phek Choo v Ang Guan Yau & Anor*. [1975] 2 MLJ 146 was drawn to my attention:

> A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare the trust or by his will.

The events relied on by the plaintiffs as giving rise to the alleged trust occurred in 1931 when the deceased was on his death bed. The Civil Law Ordinance 1909 (Cap 42 of the Laws of Straits Settlements) was then in force. In *Lee Phek Choo's* case (*ibid*), Lee Hun Hoe CJ (Borneo), speaking for the Federal Court, held that the Statute of Frauds being a statute of general application applied in Sarawak by virtue of s. 2 of the Application of Laws Ordinance (Cap 2) which provided as follows:

> 2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the common law of England and the doctrines of equity, together with statutes of general application, as administered or in force in England to the commencement of this Ordinance, shall be in force in Sarawak:
>
> Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak so far as only as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.

However, nowhere in the Civil Law Ordinance 1909, of the Straits Settlements, is there any provision making statutes of general application in the United Kingdom applicable to the Straits Settlements.

It follows, therefore, that I must hold, as in the Kelantan case of *Wan Naimah v. Mohamad* [1974] 1 MLJ 41 and the Penang case of *Diamond Peak Sdn. Bhd. v. Tweedie* [1982] 1 MLJ 97, that it is not open to the defendant to rely upon the Statute of Frauds.

In the second place, I must consider the submissions of Counsel for the defendant on the merits.

It was submitted that to create an express trust the plaintiffs had to satisfy the triple requirements of certainty of words, subject matter and objects in accordance with the principles enunciated by Lord Langdale MR in *Knight v. Knight* [1840] 3 Beav 148, 173. It was said that in the instant case none of these requirements had been fulfilled.

It was pointed out that the only evidence in support of the plaintiff's claim to a trust was the uncorroborated testimony of Abbas bin Mohd. Rouse (PW2) who had testified that the deceased had made a death bed request to Long imploring the latter to look after the deceased's family, property and business. Counsel for the defendant then attempted an analysis of the evidence adduced by the plaintiffs with a view to demonstrating that none of the three requirements laid down by Lord Langdale in *Knight v. Knight* (*supra*) had been satisfied.

It was said that as the deceased had three wives and numerous children (many of whom were not staying in the disputed property) it was not clear how many members of his family the deceased intended Long to look after. In the result, there was no certainty of objects.

It was also said that although the deceased had died leaving a motor car, two tongkangs and the disputed property, there was no evidence to show which of these assets - whether any one of them or only two of them or all three of them - the deceased was referring to when he used the expression "my property". In the result, there was no certainty of subject matter.

Then it was said that there was doubt as to language the deceased spoke when he was alleged to have created the trust. Mere expressions of intention were not enough since Equity would not perfect an imperfect trust. In the result, there was no certainty of words.

Lastly, it was pointed out that the only evidence adduced by the plaintiffs was not merely oral but hearsay.

Not content with this destructive analysis of the plaintiffs' case, Counsel for the defendant went further and argued that the case for his client might be summarised thus:

(i) at the time of the deceased's death the disputed property was still mortgaged to SNAALCT Sithambaram Chettiar for the sum of RM5,475.

(ii) Exercising his rights under the mortgage and by virtue of the provisions of Ordinance No. 36 (Conveyancing and Law of Property) the said Sithambaram Chettiar put the said property up for sale by public auction on the 28 January 1932.

(iii) At the said auction Long was declared the highest bidder and the disputed property was duly sold to him. These facts being evidenced in the deed of Indenture dated 12 February 1932. (p. 5 & 5 of the Agreed Bundle).

(iv) On 15 June 1951 Long sold the disputed property to the defendant for the sum of RM10,000 as evidenced in the deed of Indenture dated 15 June 51. (pp. 13 and 14 of the Agreed Bundle).

(v) The defendant and his father Long were thus both *bona fide* purchasers for value and that at no time did either the defendant or Long declare that they were trustees of the said property for the plaintiffs nor held themselves out as such.

In considering the submissions of Counsel for the defendant I must first of all determine the essential facts.

The vital witness for the plaintiffs was, as I have said, Abbas bin Mohamed Rouse (PW2). I found him to be a thoroughly reliable witness, very careful, very fair and in no way prepared to overstate the plaintiffs' case and in complete contrast to the defendant who was neither careful nor fair but quite prepared to make extravagant and unjustified claims. He has no doubt persuaded himself that his claims to the disputed property are justified. I shall however proceed to an evaluation of his evidence at a later stage.

Now, I accept that the essentials for the creation of a trust are these: there must exist the three certainties; that is to say, certainty of words, subject matter and objects (per Lord Langdale in *Knight v. Knight* [1840] 3 Beav 148, 173.

Upon the evidence of the witness Abbas bin Mohamed Rouse, which I unhesitatingly accept as representing the truth, I am satisfied that the three certainties were fully established. The deceased had the necessary capacity to create a trust and the words uttered by him to this witness were sufficiently clear to demonstrate an intention to create a trust. The deceased's properties, at the material time, were easily identifiable and well capable of constituting the subject matter of a trust. Similarly, the objects of the trust, namely the members of his family, were readily ascertainable. Nor, for that matter, does the declaration of trust violate any of the statutory requirements regarding evidence or remoteness. I have already said why in West Malaysia a declaration of trust relating to land does not require to be evidenced in writing as the Statute of Frauds does not apply.

In the circumstances, I am completely convinced that the disputed property is subject to the trust declared by the deceased as particularised in the statement of claim.

On a further ground also the plaintiffs are entitled to succeed. It is settled law that a constructive trust attaches by law to specific property which is neither expressly subject to any trust nor subject to any resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. The cases of *Hussey v. Palmer* [1972] 3 All ER 774 and *Protherees v. P* [1968] 1 ALL ER 411 are good illustrations of this.

In the first of the aforesaid cases, at p. 247, Lord Denning characterised a constructive trust as a

> "trust imposed by law wherever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in the cases where the de fendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or share it. The trust may arise at the outset when the property is acquired or later on, as the circumstances require. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution.

The contractual theory upon which a fiduciary relationship may be based was originally proposed by Austin Scott in 1949 when he wrote as follows:

> Who is a fiduciary? A fiduciary is a person who undertakes to act in the interests of another. It is immaterial whether the undertaking is in the form of a contract. It is immaterial that the undertaking is gratuitous. (Scott "*The Fiduciary Principle*" [1949] 37 Calif L Rev 521, 540.

The contract analogy is certainly there. In essence, the bargain is the offer by the beneficiary or someone else on his behalf such as the settler of a trust of vulnerability in return of a promise from the fiduciary of loyalty. In this respect it is, if not a contract *per se*, at least like a contract in its form.

This act of binding oneself to a duty of loyalty is often described as a necessary facet of fiduciary obligations. In his work on *Fiduciary Obligations* [1977] Prof. Finn says at p. 9:

> For a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or advance the interests of another.

There are similar statements in *Bowstead on Agency* 13th Edn. pp. 1 - 3. Indeed, as far back as 1888 we find Bowen LJ referring to the fiduciary relationship as alternatively "as implied contract or an equitable right" (See *Boston Deep Sea v. Ansel* [1888] 39 Ch D 339.

In the instant case, according to the evidence led on behalf of the plaintiffs, there was such a contract or at least implied contract and this was reinforced by the fact that Long, after the death of the deceased, assumed the rights and duties of a trustee. Maitland speaking on *de facto* trustees says "If anyone assumes the rights that are to be conferred on the trustee, one thereby assumes all the duties of the trust" (*Maitland and Brunyate, Equity*, Revised Edn. [1949] p. 566). So you cannot take the good parts of being a trustee without also taking the bad. The basis of this proposition is fundamental; namely, any action consistent only with acceptance constitutes acceptance. Therefore, once a person uses the power that is offered, he must be held to have accepted it and therefore to have accepted the duty. As with many other legal situations, the Court will not allow a person to approbate and reprobate; that is, to both accept and reject the relationship. I derive analogical support for this in the doctrine of part performance in contract law.

It was submitted by Counsel for the plaintiffs, and I so find, that Long by assuming the position of guardian of the deceased's minor children, by the management of the deceased's business and by looking after the general welfare of the deceased's family put himself in a fiduciary relationship to the widows and the children, as such, he was under a duty to take all reasonable steps to protect the properties (including, of course, the disputed property) which after the deceased's death, vested in the widows and the children.

In these circumstances, Long's failure to prevent the sale of auction of the disputed property (which, incidentally, was then the most valuable asset left by the deceased) his purchase of it was unconscionable and a serious breach of trust. It is of course, fundamental that a trustee must not place himself in a position in which his interest may conflict with his duty.

So, for example, in *Boardman v. Phipps* [1966] All ER 721, 756 the appellants were held to be constructive trustees of shares acquired by them honestly but as a result of opportunity and information gained by them when they stood in a fiduciary relationship to the respondent.

Similarly, a trustee cannot purchase trust property without the consent of the beneficiaries or under a Court order and such purchase would be voidable at the instance of any beneficiary. (See *Holder v. Holder* [1968] All ER 116, 126).

In the present case, the evidence, as I have said, disclosed that Long purchased the disputed property at a price of RM4,300 some two months after the death of the deceased. To do so he executed a mortgage in favour of the vendor, a chetty, for the sum of RM4,000. The latter subsequently enforced the mortgage and sold the disputed property at a public auction but Long emerged the highest bidder at RM4,300. Surely, he could have taken steps to save the disputed property from being auctioned had he so wished especially since the deceased had left a thriving stevedoring business and other assets in his care. Then again, Long seems to have left the widow and the children in the dark as regards the auction or the fact that he had purchased the disputed property. It was not until 1976, that is, after the widows' death and when the defendant commenced proceedings to eject two of the plaintiffs, that the latter first became aware of these facts. Considering the relationship of the parties such surreptious conduct was hardly consistent with Long being a *bona fide* purchaser.

In these circumstances, since Long stood in a fiduciary position in relation to the widows and the orphans, I had to ask myself whether the defendant had discharged the onus of proving the *bona fides* of the purchase by Long. Having regard to the matters outlined above, the inevitable conclusion at which I have arrived is that he has clearly failed to do so. The conveyance of the disputed property to Long is thus voidable at the instance of the deceased's beneficiaries.

That, however, is not the end of the matter for I should in deference to the arguments addressed to me consider the further question whether the defendant is a *bona fide* purchaser for value without notice of the Long's fraud aforesaid.

The defendant's evidence that he purchased the disputed property from his father for a cash consideration of RM10,000 was impugned and, in my opinion successfully, on the ground that having regard to the defendant's resources at the time it was impossible for him to have done so.

It will be recalled that during my review of the defendant's testimony, I mentioned that it was his case that he had paid the sum of RM10,000 in cash to the solicitor who prepared and attested the conveyance but the latter had, curiously enough, given him no receipt. Then, again, there was the awkward admission by the defendant that although he had been operating a litherage business since 1947, he had no bank account in 1951 - the year of the purchase - and, instead, preferred to keep the money in a cupboard in his bedroom at home rather than on fixed deposit in a bank as he was "not keen on getting interest".

There is a further point which needs to be made. It was alleged by the plaintiffs, and not challenged by the defendant, that the defendant knew that the deceased was the owner of the disputed property and, that after his death, Long looked after the family and property of the deceased. It was also not disputed that only when the disputed property was conveyed to the defendant did the latter come to know that Long had purchased it at the auction. Moreover, the defendant knew that the widows and children of the deceased had been residing in the disputed premises since 1928 rent free; the defendant himself never asking for rent although he had been the owner since 1951. Indeed, the defendant studiously refrained from informing the widows and children that he had purchased the disputed property. It is therefore reasonable to infer from these facts that the defendant must have known that Long was a trustee express or constructive of the property of the deceased including the disputed property.

I have already noted that Counsel for the plaintiffs also relied (in my view quite rightly) on the doctrine of constructive notice, according to which a person who abstains from making those enquiries which a reasonable prudent person would make and which would have led to the discovery of the existence of the trust is deemed to have actual notice of it.

It was said that even if the defendant did not have actual notice of the trust the circumstances of the case, in particular, the matters referred to above, were such that the doctrine applied.

I am satisfied, upon the facts before me, that, so far as may have been necessary, the plaintiffs had successfully invoked the doctrine of constructive notice.

It follows that since the defendant acquired the disputed property with notice of the trust, he is deemed to be trustee of it for the beneficiaries of the deceased. See *Nelson v. Larhold* [1947] All ER 251 and *Loke Yew v. Swettenham Rubber Co. Ltd.* [1913] AC 491.

In these circumstances, having regard to my finding of fact that Long held the disputed property as a bare trustee for the plaintiffs, it makes no difference whether the conveyance of the disputed property from Long to the defendant was by way of genuine or fictitious sale nor does it make any difference whether or not the defendant had, at the material time, notice of the trust, for the maxim is *nemo dat quoad non habet*. If, as I have held, Long held the disputed property as a bare trustee for the plaintiffs he was in no position to convey any beneficial interest therein to anyone.

In point of fact, however, I have found, the defendant was not a *bona fide* purchaser and the reference in the conveyance of the disputed property from Long to him of a consideration of RM10,000 was wholly fictitious.

Nor, for that matter, will the provisions as to indefeasibility of title in the National Land Code 1965 be of any assistance to the defendant notwithstanding the fact that his original title to the disputed property was replaced with a title under the Code.

A consistent current judicial opinion has made this point clear. I now propose to refer to some of these cases.

In *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* [1923] NZLR 1137 (affirmed on appeal to the Privy Council [1926] AC 101) Salmon J said:

> The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of the adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand and either to make further inquiries before purchasing, or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further inquiry or delay to purchase an unencumbered title with intent to disregard the claimant's rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance which, according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud.

It is noteworthy that at the material time the New Zealand Land Transfer Act, s. 182, provided that knowledge of an unregistered interest does not amount to fraud but this did not prevent the Courts there from looking sympathetically at the claimant with an unregistered interest where the facts disclose that the conduct of the registered proprietor and his knowledge of the unregistered interest amounts to dishonesty, trickery or a positive attempt to deprive the plaintiffs had, as against the defendant, successfully invoked the doctrine of constructive notice in so far as their unregistered interests were concerned. I am further satisfied that the defendant was not a *bona fide* purchaser of the disputed property as alleged by him for the simple reason that he never had the necessary resources to pay the consideration of RM10,000.

Moreover, in *Loke Yew v. Port Swettenham Co. (ibid)* the Privy Council held that registration by the Rubber Company with full knowledge of Loke Yew's interest was a "deliberate fraud". In Malaysia, of course, unlike most other Torrens jurisdictions, there is no express provision to the effect that "knowledge that any trust or any unregistered interest is in existence shall not of itself be imputed as fraud".

In *Hosking Properties v. Barnes* [1971] SASR 100, at p. 103, the Supreme Court of South Australia said this:

> To hold that mere notice of the unregistered interest of the defendants amounts to fraud would in my opinion stultify the provisions of **s. 72.** I think that in enacting the section the legislature meant that a ***bona fide*** purchaser might disregard the fact of there being an unregistered interest and need not take into consideration the rights of persons claiming under that unregistered interest.
>
> (Emphasis supplied).

The Court there relied on *Munro v. Stuart* [1924] 41 SR (NSW) 203 and *Oertel v. Hordern* [1902] 2 SR (NSE) (Eq.) 37.

In the present case, I am satisfied that the reference of a consideration of RM10,000 in the conveyance from Long to his son, the defendant, was wholly fictitious and, viewed in the context of the surrounding circumstances hereinbefore mentioned, a deliberate attempt by them to defeat the unregistered rights of the family of the deceased Ibrahim. The defendant was thus not a *bone fide* purchaser and so was not at liberty to disregard the unregistered interests of the plaintiffs especially so since no-where in the National Land Code 1965 is there any provision equivalent to s. 72 of the South Australian statute referred to in *Hosking's* case.

A review of the decisions in Malaysia will show that the Courts have frowned upon the conduct of purchaser who attempts to defeat the rights of the holder of an unregistered interest in land to the extent of finding in favour of the latter despite the absence of fraud.

In this context I need no more than refer to two decisions of the Federal Court. In *Ong Chat Pang v. Valliappa Chettiar* [1971] 1 MLJ 224 the Court held that the registered proprietor who had knowledge of a prior contract of sale and that the prior purchaser had applied for the entry of caveat to protect his interest, did not obtain an indefeasible title as he was not a *bona fide* purchaser for value. To the same effect is the case of *Sungei Biak Tin Mines v. Saw Choo Theng* [1970] 1 MLJ 199 where the Court refused to lend its aid to the registered proprietor who had knowledge of an earlier lease which had been wrongfully cancelled and removed from the Register by the Registrar. Placing no reliance on fraud, the Court found that as the subsequent lessee had knowledge that an appeal relating to the earlier lease was pending in the Federal Court to allow the subsequent lessee to obtain an indefeasible title by registration would be permitting him "to thumb his nose at a judgment of the Federal Court".

In all the circumstances, I enter judgment for the plaintiffs as follows:

(a) a declaration that the defendant holds the disputed property as a bare trustee for the widows and children of the deceased Mohammed Ibrahim.

(b) An order that the defendant do, within 7 days from date hereto, transfer the disputed property to the First and Fifth plaintiffs as trustees to hold the same in trust for the said beneficiaries failing which the Senior Assistant Registrar of this Court to do so;

(c) the defendant to pay the plaintiffs the costs of this action; and

(d) Liberty to apply.

Also found at [1988] 1 CLJ 294